

Message Text

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DRAFTED BY L:L/M/SCA:JOHN A. BOYD:EDK

APPROVED BY EXT. 23062, 5/5/74

USIA - A.V. BOERNER

ARA/BR: A. WATSON (SUBS)

JUSTICE - B. RISTAU (INFO)

L/ARA - DAVID GANTZ (INFO)

DESIRED DISTRIBUTION

BRUNO RISTAU DEPT JUSTICE, USIA

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FM SECSTATE WASHDC

TO AMEMBASSY BRASILIA IMMEDIATE IMMEDIATE

C O N F I D E N T I A L STATE 092404

E.O. 11652: N/A

TAGS: AFSP, BR

SUBJECT: LITIGATION -- LABOR SUIT BY JOSE AUGUSTO COSTA --

FORMER USIS EMPLOYEE BRASILIA

REFS: (A) BRAZILIA 3079 (B) BRAZILIA 3180

1. DEPARTMENT APPRECIATES AWKWARDNESS OF EMBASSY'S CIRCUMSTANCE AND COMPLIMENTS EMBASSY FOR ABLE REPORTING OF DEVELOPMENTS, BUT DEPARTMENT DOES NOT BELIEVE USG INTEREST SERVED BY BROADENING THE POWER OF ATTORNEY TO DR. AMARAL AND BY AUTHORIZING DR. AMARAL TO CLARIFY AND AMPLIFY HIS CITATION AS REQUESTED IN PARAS. (A) AND (B) AT CLOSE OF REFTEL (B). DEPARTMENT WILL ENTERTAIN EMBASSY'S RECOMMENDATION ON ADJUSTMENT OF FEE OF DR. AMARAL BUT WISHES TO WITHHOLD FINAL DECISION FOR MOMENT.

2. DR. RISTAU IS ON A ONE-WEEK VACATION AND HAS NOT BEEN LOCATED SINCE RECEIPT OF REFTEL(B). HOWEVER, BEFORE
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LEAVING RISTAU EXPLICITLY STATED THAT USG SHOULD NOT

ATTEMPT TO ARGUE THIS CASE IF LABOR COURT DID NOT GRANT THIRTY DAY POSTPONEMENT. FURTHERMORE, IN ANOTHER CASE IN ITALY, RISTAU HAS ALREADY TAKEN SIMILAR POSITION WHILE CONTEMPLATING DIPLOMATIC NOTE TO FOREIGN MINISTRY OBJECTING TO EXTREMELY SHORT PERIODS OF TIME TO ANSWER WHICH EFFECTIVELY DEPRIVE USG OF OPPORTUNITY TO ANSWER COMPLAINTS

IN REASONABLE FASHION. THUS, DEPARTMENT IS CONFIDENT THAT JUSTICE WOULD OBJECT TO EXPANDING DR. AMARAL'S POWER OF ATTORNEY ESPECIALLY IN VIEW OF EVENTS OF THIS CASE. FIRST, DEPARTMENT HAS NOT RECEIVED ANY DOCUMENTS RELATING TO THIS CASE, IS UNABLE TO DETERMINE IF THIS CASE SHOULD BE HEARD IN THIS LABOR COURT NOW OR IF AND HOW THIS CASE SHOULD BE TRANSFERRED TO BRAZILIAN FEDERAL COURT, AND THUS IS NOT IN A POSITION TO ADVISE EMBASSY IF JURISDICTIONAL ARGUMENT TO THE EFFECT THAT FOREIGN DIPLOMATIC MISSIONS ARE NOT SUBJECT TO LABOR COURT JURISDICTION WHILE CONSULAR ESTABLISHMENTS ARE SUBJECT TO LABOR COURT JURISDICTION AS ARGUED EXTEMPORANEOUSLY BY DR. AMARAL IS ADVISABLE DEFENSE IN THIS CASE. (COULD SUBJECT COSTA'S WORK BE FOUND TO BE "CONSULAR" AS OPPOSED TO "DIPLOMATIC" BY THIS LABOR COURT?) SECOND, DEPARTMENT NOTES IN PARA 3 OF DISCUSSION ENTITLED "OTHER DEVELOPMENTS AND COMMENT" THAT, EVEN IF SUCH A JURISDICTIONAL ARGUMENT WERE VALID, DR. AMARAL COULD NOT PROPERLY INTRODUCE OTHER ARGUMENTS WHICH DR. JARDIM SUCCESSFULLY ADVOCATED ON PREVIOUS OCCASIONS. THUS, BY ATTEMPTING TO BROADEN DR. AMARAL'S POWER OF ATTORNEY AT THIS STAGE, DEPARTMENT WOULD BE OPENING DOOR TO THE JURISDICTIONAL ARGUMENT IN A LIMITED FASHION WHICH FURTHER RESEARCH MAY PROVE TO BE INEFFECTIVE. IF DEPARTMENT IS TO ARGUE JURISDICTIONAL DEFENSE, DEPARTMENT WOULD WISH TO MAKE FULL RANGE OF ARGUMENTS WHICH WOULD BE IMPOSSIBLE IF DEPARTMENT ATTEMPTED TO BROADEN DR. AMARAL'S POWER OF ATTORNEY AT THIS STAGE. HENCE, DEPARTMENT BELIEVES THAT WISER COURSE IS TO INSTRUCT DR. AMARAL TO SUBMIT A TRANSLATED VERSION OF THE POWER OF ATTORNEY WHICH HE ORIGINALLY SUBMITTED TO LABOR COURT ON MAY 3 WHICH WILL AVOID ANY QUESTION OF IMPROPRIETY ON PART OF USG IN TRANSLATING DOCUMENT PREVIOUSLY SUBMITTED TO COURT AND HOPEFULLY FOCUS ATTENTION

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OF COURT ON INABILITY OF DR. AMARAL TO ARGUE FULLY ISSUE OF JURISDICTION. DEPARTMENT REALIZES THAT THIS COURSE OF ACTION POSES POTENTIAL EMBARRASSMENT FOR DR. AMARAL, BUT DEPARTMENT HYPOTHESIZES THAT COURT WILL APPRECIATE THAT DR. AMARAL WHEN FORCED TO DIFFICULT CHOICE BY SUDDEN REVERSAL OF COURT TOOK A POSITION WHICH HE THOUGHT WOULD BE BEST FOR CLIENT BUT WHICH DID NOT PROVE TO BE SUCH. DEPARTMENT UNDERSTANDS AND APPRECIATES DR. AMARAL'S ACTION

AND ENTERTAINS NO ANIMOSITY TOWARD HIM. WHEN TRANSLATED POWER OF ATTORNEY IS PRESENTED, DR. AMARAL SHOULD MAKE KNOWN THAT FURTHER AMPLIFICATION OF HIS POSITION ON THE JURISDICTION OF THE COURT IS NOT FORTHCOMING IN VIEW OF THE LIMITED NATURE OF THIS POWER OF ATTORNEY.

3. DEPARTMENT REALIZES THAT SUCH ACTION ON THE PART OF USG WILL PRESENT SIGNIFICANT OPPORTUNITY FOR DEFAULT

JUDGMENT IN THIS CASE. HOWEVER, DEPARTMENT CONTEMPLATES TWO PLANS TO BLUNT THIS THREAT. FIRST, A DEFAULT JUDGMENT COULD BE APPEALED, AND DEPARTMENT HYPOTHESIZES THAT SUCH AN APPEAL WOULD HAVE A SUBSTANTIAL CHANCE OF SUCCESS IN VIEW OF PREVIOUS RULINGS OF BRAZILIAN COURTS TO THE EFFECT THAT LABOR COURTS DO NOT HAVE JURISDICTION OVER FOREIGN EMBASSIES AND IN VIEW OF THE RECORD PRESENTED IN THIS CASE ESTABLISHING A GOOD FAITH EFFORT BY USG TO PREPARE TO RESPOND AND AN INABILITY TO RESPOND BASED ON THE COURT'S REFUSAL TO PERMIT A REASONABLE TIME TO RESPOND. IN U.S. COURTS JURISDICTIONAL ISSUES CAN BE RAISED AT ANY TIME ON APPEAL EVEN IF NOT PROPERLY ADVANCED AT TRIAL LEVEL. HOPEFULLY BRAZILIAN COURTS HOLD TO SAME CONCEPT PERMITTING JURISDICTION TO BE ARGUED ON APPEAL EVEN IF DR. AMARAL'S EXTEMPORANEOUS ORAL ARGUMENT ON JURISDICTION FOLLOWED BY CLARIFICATION OF HIS INABILITY TO ARGUE SUCH DOES NOT PROPERLY RAISE ISSUE BEFORE LABOR COURT. SECOND, DEPARTMENT SUGGESTS THAT EMBASSY DELIVER ANOTHER DIPLOMATIC NOTE TO FOREIGN MINISTRY REQUESTING POSTPONEMENT OF HEARING FOR THIRTY, NOT SEVEN, DAYS SO THAT USG CAN PROPERLY PREPARE FOR CASE. EMBASSY COULD POINT OUT PREVIOUS EFFORTS TO OBTAIN POSTPONEMENT AND SERIOUS IMPLICATIONS FOR ALL FOREIGN EMBASSIES IF LABOR COURTS ARE ALLOWED TO ACT AS THIS ONE IS. EMBASSY MAY

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WISH TO POINT OUT THAT THIRTY DAYS IS MINIMUM PERIOD FOR DOCUMENTS TO BE SENT TO WASHINGTON FOR CONSIDERATION, FOLLOW-UP INQUIRIES, AND SUBSEQUENT PREPARATION BY LOCAL TRIAL LAWYER FOR HEARING.

4. DEPARTMENT REQUESTS THAT EMBASSY CONDUCT SEARCH FOR LAWYER IN BRAZILIA WHO HAS EXPERIENCE IN INTERNATIONAL LAW, LABOR RELATIONS, AND PREFERABLY SPEAKS ENGLISH. JUSTICE DESIRES DESCRIPTION OF AT LEAST ONE SUCH LAWYER IN TERMS OF HIS EDUCATION, EXPERIENCE, AND FEE SCHEDULE. EMBASSY IS INSTRUCTED NOT TO RETAIN SUCH LAWYER FOR THIS CASE UNTIL FURTHER INSTRUCTED. DOES DR. AMARAL FIT THIS DESCRIPTION? WITH REGARD TO THE ISSUE OF TOKEN FEE REQUESTED BY DR. AMARAL, DEPARTMENT SUGGESTS THAT EMBASSY REQUEST DR. AMARAL'S STANDARD FEE SCHEDULE FOR APPEARANCE

SUCH AS IN THIS CASE TO ARGUE MOTION TO COURT. THOUGH ATTORNEY FEE FOR HALF DAY APPEARANCE IN COURT IN MAJOR CITIES IN USA OFTEN IS IN NEIGHBORHOOD OF U.S. DOLS 250, THE U.S. DOLS 90 FEE SUGGESTED BY DR. AMARAL IN THIS CASE MAY BE IN LINE WITH LOCAL BAR SCHEDULE.

5. BECAUSE OF CONSTRAINT OF TIME TO REPLY BY 6:00 P.M. ON MAY 5, DEPARTMENT HAS NOT BEEN ABLE TO OBTAIN APPROVALS TO THIS MESSAGE INCLUDING APPROVAL OF USIA WHICH WOULD

NORMALLY BE SOUGHT. THOUGH DEPARTMENT IS CONFIDENT OF ADVICE CONTAINED HEREIN, DEPARTMENT INTENDS TO SEND FOLLOW-UP CABLE AS SOON AS OTHER APPROVALS OBTAINED. IF DESIRED, EMBASSY MAY PHONE JOHN BOYD AT (202) 632-3062 (OFFICE) OR (202) 338-7134 (HOME). RUSH

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